

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WP(C) No.1879/2008**
% **Date of Decision: 04.05.2011**
UOI Petitioner
Through Mr. H.K. Gangwani, Advocate
Versus
Surinder Kumar Respondent
Through Mr.A.K. Trivedi, Advocate

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.
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1. The petitioner, Union of India through the Secretary, Directorate of Health Services has challenged the order dated 5th December, 2007 passed in OA No. 2664/2006, MA No. 2365/2006 and MA No. 1617/2007 by the Central Administrative Tribunal, Principal Bench, New Delhi titled as 'Sh. Surinder Kumar Vs. UOI & Ors.,' allowing the original application of the respondent and

directing the petitioners to pay the difference of the salary of LDC to the respondent from 1991 to 2006.

2. Brief facts to comprehend the disputes are that the respondent was appointed in the Central Government Health Scheme as a Dresser (Group D) w.e.f. 19th April, 1979. He continued to work as a dresser till 1991 when he was posted in the Ayurvedic Hospital, Lodhi Road w.e.f. 14th March, 1991. The respondent had continued to work in the Ayurvedic hospital since then, however he was asked to perform the duties of Lower Division Clerk (LDC) w.e.f. 25th April, 1991 and thereafter the respondent continuously looked after the work of registration, preparation and submissions of IPD and OPD monthly report to the higher authorities. The respondent contended that since there was no post of LDC, he was asked to perform the duties of LDC which he continued to perform from 25th April, 1991. The order dated 14th March, 1991 transferring the respondent from the Central Government Health Scheme Dispensary, Ghaziabad to Central Government Health Scheme, Ayurvedic Hospital Ali Ganj had not stipulated that on transfer, he would work only as a Dresser, Grade-D post.

3. The respondent contended that after his transfer he was looking after the entire clerical work of the hospital, i.e., registration

work, duties of care taker, managing the kitchen of the hospital, preparation and submissions of monthly report of the Hospital, doing computer work, report of IPD and OPD, however, no financial benefits for working as an LDC has been given to him since 1991.

4. The respondent had submitted a representation dated 25th January, 1993 for considering his case for promotion to the post of LDC, and if this was not possible, he requested that he may at least be given the difference in the pay of a dresser and an LDC. The respondent gave various other representations, which were forwarded by the Administrative Officer (NG) by order dated 6th August, 1993. The respondent contended that he had made many personal visits to various authorities, and every time he used to be assured that on fixation of his pay, the difference in the salary of LDC and dresser will be paid and after completion of this process he would be communicated. However no decision was taken, rather he was transferred back to the Central Government Health Scheme.

5. On transfer of the respondent in 2006, the Medical Superintendent of Ayurvedic Hospital, where he was performing the duties of LDC, wrote a letter dated 16th October, 2006 to re-transfer the respondent to Ayurvedic Hospital, especially till posting of LDC/UDC is done to avoid the critical situation of running the IPD,

as there was nobody to manage the day to day kitchen requirements and other clerical works.

6. The respondent thus, contended that there is no doubt that though he was appointed to the post of Dresser (Grade D) he was made to work as LDC and that he had been performing the duties of LDC from 14th March, 1991. In the circumstances, the respondent claimed the difference in pay of LDC and the dresser for all the years he worked as LDC.

7. The respondent also relied on *Judhistir Mohanty Vs. State of Orissa*, (1996) 10 SCC 531 and *Mohd. Swaleh Vs. UOI & Ors.* (1997) 6 SCC 200, in support of his claim for the difference in the pay of an LDC and a dresser.

8. The claim of the respondent was contested by the petitioners contending, inter alia, that the respondent had not been performing the duties and the functions of the higher post of clerk and therefore, the respondent is not entitled for further relief from the hospital as he has been posted at CGHS First Aid Post, Nirman Bhawan, New Delhi as a dresser w.e.f. 21st February, 2007.

9. The petitioner categorically asserted that the respondent was transferred from CGHS Dispensary, Ghaziabad to Ayurvedic

Hospital, Lodhi Road as a dresser and that he had not been asked to perform the duties of an LDC from March, 1991 to February, 2007.

10. The petitioner alleged that 5 LDCs and 5 UDCs were posted from time to time, and that they had been performing the clerical duties at the hospital. So there was no question of the respondent being asked to work on the post of Clerk or the respondent doing the clerical work as was detailed by him in the original application. Rather it was categorically asserted that the respondent had never done the alleged work of clerk, except his duties on which he had been deputed and appointed by the Government.

11. Regarding appointment of the respondent as LDC, on account of allegedly having worked from 1991 till 2006 as LDC, it was asserted that the notified recruitment rules contemplates filling up 90% of the LDC vacancies through candidates sponsored by the Service Selection Board and the remaining 5% of the vacancies were to be filled up from Group 'D' employees possessing the prescribed qualifications through a competitive examination, whereas the other 5% was to be filled up from the same category on seniority cum fitness basis. Therefore, the respondent cannot be appointed to the post of LDC solely on account of having worked as LDC from 1991 upto 2006.

12. The Tribunal after considering the pleas and contentions of the parties had allowed the Original Application of the respondent and directed to pay the difference of salary of an LDC and a Dresser from 1991 to 2006 within a period of one month from the date of receipt of copy of order dated 5th December, 2007. The Tribunal held that the post of LDC was not filled or was not there from 1991 to 2006 i.e. for 15 years and that the work as LDC was carried out by the respondent. So much so that when the respondent was transferred back to the post of Dresser (Group D), the Superintendent of Ayurvedic Hospital where the respondent had been working since 1991 had requested the re-transfer of the respondent, as the Ayurvedic Hospital was not having any LDC and they didn't have anybody available to carry out the work of an LDC in the absence of the respondent.

13. The Tribunal relied on 'equal pay for equal work' and Fundamental Rule 49 and thus held that the respondent is entitled for additional emoluments admissible under law. The Tribunal repelled that the controlling authority was within its jurisdiction to take work in any manner from an employee under the Fundamental Rule 11. The pleas that charter of duties attached to the post of Dresser includes any other work that would commensurate with the nature of work of a Dresser and therefore, the respondent had been

asked to perform the duties of LDC when the work of Dresser was not available and that the post was lying vacant was not accepted. The Tribunal also noted the plea of the petitioner that the post of clerk in Group C was to be filled up through Staff Selection Commission and the respondent had not participated in the same and therefore, he has no right to hold the post on regular basis. The Tribunal did not accept the plea of the petitioner for not paying the difference in emoluments on the ground that the Government cannot approbate and reprobate by contending that the services of the respondent might have been utilized as a stop-gap-arrangement with a view to avoid inconvenience to the department. It was also held that considering the charter of duties, the duties of a Dresser (Group D) post cannot be equated by any rationale with the duties of an LDC which is a Group C post even according to the pleas of the petitioner.

14. Reliance was also placed on the fact that the petitioner did not rebut the plea of the respondent specifically that he had worked as an LDC from 1991 till 2006 and thus, held that the respondent performed the duties and the responsibilities attached to a higher post of LDC and therefore he is entitled for the difference in emoluments. The petitioner has impugned the order of the Tribunal contending inter-alia that no formal order to hold the post of LDC in substantive or officiating capacity as a temporary measure was

issued by the petitioner, and therefore, the case of the respondent does not fall under the provision of FR 49. The petitioner also contended that the request of the Medical Superintendent of Ayurvedic Hospital to retransfer the respondent from CGHS, Lodhi Road, to Ayurvedic Hospital cannot be construed as a formal order to officiate the post of LDC or to discharge the duties and the responsibilities of the post of LDC. According to the petitioner, the order has been passed merely on the letter of Medical Superintendent seeking retransfer of the respondent to Ayurvedic Hospital to perform the duties of LDC , who was initially appointed to the post of Dresser . According to the petitioner, the respondent was entrusted some of the functions performed by LDC without any responsibilities and therefore, the respondent is not entitled for any emoluments as LDC. The plea that the respondent did not complain/resist has also been raised in the petition to contend that the respondent merely performed some of the functions of LDC and that it was not saddled with the duties and the responsibilities of the LDC. Another plea raised by the petitioner is that the respondent might have been asked to function as a LDC as a stop-gap-arrangement, but this statement cannot be said to be indicative of the fact that all the duties and the responsibilities of LDC were entrusted to the respondent, without the issue of a formal order.

15. The averments of the petitioner were refuted by the respondent by filing a counter affidavit in the writ petition dated 18th September, 2008 categorically asserting that from 14th March, 1991 he had been performing the duties of a clerk i.e. looking after the work of registration, preparation and submission of the IPD and OPD monthly report and the entire clerical work of the Hospital. The respondent also averred that he had been performing the duties of caretaker and also managed the kitchen of the Hospital, however, no financial benefit was given to him. He also categorically asserted that there was no work of Dresser in Ayurvedic Hospital and since there was no LDC or UDC in the Hospital, therefore, he had been asked to perform the work of LDC and he had in fact performed all the duties of LDC in the Ayurvedic Hospital. The respondent also produced a copy of the letter dated 3rd February, 2007 from the Medical Superintendent of Ayurvedic Hospital addressed to Sh.S. Bhattacharjee, Additional Director, CGHS (CZ) categorically asserting that transfer of the respondent without providing any one competent to do the work which was taken from him is a clear cut intention of the Administrative side of the CGHS, to force the closure of this only Ayurvedic Hospital in CGHS. The relevant extract of the communication dated 3rd February, 2007 is as under:-

" With reference to memorandum No.1-13/2004-CGHS/CZ 646 Dated 02.02.2007, it is stated that this office has not received any stand relieve order mentioned in your memo under reference. Therefore, the question of non compliance is beyond question. **However, the transfer of Sh.Surinder Kumar without providing any one competent to do the work being taken from him is a clear cut intention of administrative side of CGHS, to force the closure of this only Ayurvedic Hospital in CGHS.** Copy of my earlier submission is attached for your kind appraisal and necessary action in this regards.

Now the CGHS (HQ), Bikaner House has transferred a LDC vide order no.4-7/1999-CGHS/Estt.(NG)/ 14908-917 Dated 15.12.2006, and she has joined on 04.01.2007. It is observed that she is not competent to manage the Imprest money account/record in cash book etc. She needs some period to understand the aforesaid work.

It is requested that a UDC may please be posted against vacant post to enable the undersigned to relieve Sh.Surinder Kumar Dresser, who is still managing the work of Imprest money, kitchen, typing, computer etc.

16. Additional affidavit dated 4th May, 2009 was filed on behalf of the petitioner detailing the duties of Dresser in Ayurvedic Hospital which was replied by the respondent by filing affidavit dated 2nd December, 2009 contending inter-alia that he was asked to perform the duties of the registration department on 25th April, 1991 by order dated 25th April, 1991 and thereafter he continued to perform the duties of LDC in the Hospital. The respondent relied on the order dated 25th April, 1991 a copy of which was not produced by the petitioner along with the writ petition, though the copy of the said

order was produced by the respondent before the Central Administrative Tribunal, Principal Bench. The respondent, therefore, annexed the copy of the Memorandum dated 25th April, 1991 with his reply which is as under:-

“ Sh.Surender Kumar, Dresser is being ordered that he will work in Regn Department today on 25.4.91, because the Lower Division Clerk of Regn Depatt. is on long leave and other Nursing Attendant is absent today.

Keeping in view the urgency and deficiency of employees, it is necessary to give the work of Regn. to Shri Surender Kumar, therefore, he should report for work immediately.”

17. Another Office Memorandum dated 13th January, 1993 was also issued pertaining to the respondent, stipulating that at registration counter no employee is available and therefore, the respondent has to work from 7.00 AM to 1.00 PM.

18. To the affidavit dated 2nd December, 2009 filed by the respondent, a rejoinder affidavit dated 5th May, 2010 was filed by the petitioner contending that the respondent was posted as a Dresser in Ayurvedic Hospital. The petitioner also produced a copy of the sanctioned strength of the employees at CGHS, Ayurvedic Hospital, Aliganj to contend that the respondent was only performing the duties of Dresser. If there had been no work for Dresser, he might have been utilized for some other work because the surgical work

was performed only on Tuesday in Kashar Sutra Clinic. The petitioner also contended that the respondent might have performed the duties of clerk only for a particular day on 25th April, 1991 and for 10 days in the year 1993 w.e.f. 4th January, 1993 to 13th January, 1993. The petitioner also asserted that since March, 1991 till date the post of clerks was vacant only for four months in the year 1991 and for three years six months in June, 2001 to February, 2005 and for one year three months during September, 2005 to January, 2007 the respondent worked as stop-gap-arrangement. It was also asserted that during this period an UDC was in position to perform the duties of the clerk in the absence of the LDC. Therefore according to the petitioner, the respondent only performed the duties as Dresser and not as LDC.

19. Regarding performing the duties of LDC and preparing the Cash Book, Petty Vouchers, Kitchen Ledger, Monthly Report of IPD/OPD etc., it was asserted that the record was prepared and maintained by the concerned officials and not by the respondent.

20. This Court has heard the learned counsel for the parties in detail and has also perused the record produced by the petitioner along with the writ petition. Some of the record which was not produced before the Tribunal, was produced by the petitioner

without seeking leave of this Court and without disclosing any cogent reason as to why the record now sought to be produced, regarding the functioning of the respondent as a Dresser could not have been produced before the Central Administrative Tribunal. In the absence of any cogent reason for not producing the record before the Tribunal and which had been produced before this Court for which no leave had been sought by the petitioner, it will not be appropriate for this Court to rely on the same.

21. Despite additional affidavit filed by the petitioner, some of the records were not produced and the record had only been annexed with the rejoinder affidavit to the reply filed on behalf of the respondent. In the circumstances, the respondent did not have any chance to rebut the record which was produced by the petitioner along with the rejoinder to the reply filed by the respondent to the additional affidavit of the petitioner.

22. Before the Tribunal the petitioner had contended that the respondent had not been asked to perform the duties of LDC from March 1991 to February, 2007 as 5 LDCs and 5 UDCs were posted from time to time who had been performing clerical work of the Hospital and as such there was no question of the respondent being used on the said post of LDC. The petitioner was categorical in para

4.3 of the reply filed before the Central Administrative Tribunal that the respondent had never done the alleged work of LDC. Para 4.3 of the reply filed before the Tribunal is as under:-

"That the contents of para 4.3 of the OA under reply are totally wrong, false and hence vehemently denied. **It is submitted that the applicant has never done the alleged work of clerk except his duties on which he has been working and appointed by the Government.**

23. Though the petitioner had contended that 5 LDCs and 5 UDCs were posted from time to time and they were performing the clerical duties however, the details of the alleged 5 LDCs and 5 UDCs who had performed the duties and the work of LDCs has not been disclosed. The pleas of the petitioner were disbelieved in view of the documents produced by the respondent. A letter dated 25th January, 1993 which categorically stipulated that as per order of the Medical Superintendent of the Hospital, he was working as clerk since 25th April, 1991 and that he was doing the duty at registration counter from 7.00 am to 1.00 pm. In addition to this he was also doing other clerical works. He also relied on the order No.26/1CGHS/AYD-Hospital dated 13th January, 1993 asking the respondent to work from 8.00 am to 2.00 pm at the counter instead of 7.00 am to 1.00 pm. If the petitioner had 5 LDCs and 5 UDCs then their details, such as their names and during which period they were performing the duties as clerks should have been disclosed by the petitioner. The

petitioner could have produced some documents to show that the persons other than the respondent had been performing the duties as LDC, as the respondent had categorically contended that he was doing the work of registration, preparation and submission of IPD/OPD monthly reports and the entire clerical work of the hospital. Not a single document was produced by the petitioner to show that these works were performed by someone else other than the respondent. So much so when the respondent was transferred from Ayurvedic Hospital, the Medical Superintendent, Dr.Ms.J.D.Pushpa of CGHS, Ayurvedic hospital had gone to the extent of writing to Dr.S.Bhattacharjee, Additional Director General by her letter dated 3rd February, 2007 that transferring the respondent without providing any one competent to do the work being taken from the respondent is a clear cut intention of administrative side of CGHS to force the closure of this Ayurvedic hospital. From these facts the Tribunal had no other option but to infer that the respondent was carrying out the work of a higher post, which he performed for 15 years without getting any higher emoluments. The Dresser is a Group D post and the LDC is a Group C post and in the circumstances, the Tribunal held that the respondent is entitled for the difference of the salary of LDC from

1991 to 2006 and this inference of the Tribunal cannot be termed to be illegal or perverse.

24. The Tribunal also relied on Fundamental Rule 49(iii) which contemplates that where a Government servant is appointed to hold charge of another post(s) which is rather in the same office or which though in the same office, is or not in the same cadre, line of promotion, such an employee should be allowed the pay of the higher post. The Rule 49(iii) of Fundamental Rules contemplates the holding of additional charge for a period exceeding 45 days but not exceeding three months, as in the particular case if the government servant has to hold the charge of another post for a period exceeding three months, the concurrence of Department of Personnel and Training should be obtained for additional pay beyond the period of three months.

25. Admittedly, the respondent was transferred from CGHS to the Ayurvedic Hospital pursuant to a written order. Before the Tribunal it was not even alleged that there is a post of Dresser in CGHS Ayurvedic Hospital contrary to what is being alleged in the present writ petition. Thus, the respondent was transferred pursuant to a written order categorically communicated to him about his transfer. He worked on the higher Group C post of LDC for almost 15 years

from 1991 till 2006. If however, the petitioner has not obtained the concurrence of Department of Personnel and Training, it will be most iniquitous to decline him the difference of pay after taking the work from him as LDC, on account of lapse, if any, on the part of the petitioner, which is solely imputable to the petitioner. If the respondent was asked to work as LDC, he could not have denied to work as LDC nor could he have insisted that the petitioner should first obtain the concurrence of the Department of Personnel and Training.

26. The plea of the petitioner declining the difference in pay of LDC and Dresser to the respondent is further weakened by the shifting pleas and contentions taken by the petitioner. Before the Tribunal, the plea set up was that the respondent did not work as LDC whereas in the present writ petition, the stand taken by the petitioner is that the respondent was not doing all the duties of the LDCs but was only performing some of the functions of LDC. The petitioner has not disclosed as to what are the total functions or scope of work of LDC and out of the total function which functions were performed and which were not performed by the respondent. The plea raised in ground H that the respondent might have been asked to perform certain functions as an LDC as a stop-gap-arrangement also cannot be accepted as it was the duty of the

petitioner to have disclosed the correct and exact facts. There is further shift in the stand of the petitioner, which is evident in the additional affidavit filed by the petitioner dated 4th May, 2009 describing the duty or scope of work of Dresser in Ayurvedic Hospital to again contend that the work of Dresser was available even in Ayurvedic Hospital which was performed by the respondent. Even if there was the post of Dresser in Ayurvedic Hospital, it cannot be inferred that the respondent performed the duties of Dresser alone and that the respondent was not asked to perform the duties of LDC. From the documents and pleadings it is apparent that the respondent performed all the duties of LDC for 15 years from 1991 to 2006. Not a single document has been produced by the petitioner to show that the respondent performed the duties as Dresser even on any single day. The respondent had even asked for production of record for the period from 1991 to 2007 as detailed herein under:-

- a) Cash Book, Petty Vouchers, kitchen ledger, monthly report of IPD/OPD.
- b) Inventory of Registration Counter of the above period.
- c) 100% physical verification record.
- d) Record of Care Taker, Imprest money.
- e) Letter No.702-CGHS/Ayd Hosp/L.R/ND dated 14/11/2006.

27. Had these documents been produced by the petitioner they would have shown whether the respondent worked as LDC or not.

The petitioner, however, did not produce any of these records and filed a rejoinder affidavit merely denying the averments made by the respondent. With rejoinder affidavit dated 5th May, 2010 the petitioner rather produced year wise sanctioned strength of various posts during 2000-2001, 2004 and the staff position as on 31st March, 2006. Even if these documents which should have been produced by the petitioner before the Tribunal are taken into consideration, they do not reflect that the respondent was not asked to work and perform the duties of LDC or that he performed them for a short period and not for a long period of 15 years.

28. The respondent rather filed another affidavit dated 16th September, 2010 in reply to the allegations made by the petitioner in its rejoinder affidavit, reiterating his pleas and specifically deposing about the work taken from him as LDC during the said period. Para 3 to 6 of the said affidavit are as under:-

“3. That the applicant was preparing and maintaining the daily patients attendance reports and used to prepare the monthly reports of the patients. This duty pertains to Lower Division Clerk. The applicant continued to look after the registration work from 25/04/1991 upto 2005.

4. That in the year of 2005 respondent was assigned the following addl.work:-

- a) Maintenance of Imprest money of Hospital.
- b) Maintenance of Cash Book.

- c) Maintenance of stock ledger book.
- d) Submission of Indents to stores etc. The work of typing, computer and looking after the maintenance of raw material of kitchen.

5. The 100% physical verification was carried out during the period of Dr.Kishori Lal, Chief Medical Officer Incharge IPD and the entire records bears the signatures of the respondents. All these work performed by the respondent pertains to Lower Division Clerk (LDC).

6. That the following documents would prove the performing the duties of clerk by the respondent:-

- a) OPD Patients report from 1991 to 2005.
- b) Inventory of Regn Counter OPD.
- c) Ledger of Kitchen, Cash Book, Bills of Imprest Money, Stock Ledger of Clerk Room, Indents, Monthly reports etc from 2004 to 09th Feb 2007.
- d) Letters dated 25/04/1991 (Annexure-R/2, Page-94) Letter dated 13/01/ 1993 (Annexure- R/3, Page-96) Letter No. 650-CGHS/Ayd Hosp/LR/ND dated 16/10/ 2006 (Page- 17 of Paper Book) and 03/02/ 2007 (Page- 78 of Paper Book).

29. These categorical assertions of the respondent has not been denied by the petitioner nor any documents has been produced which could have negated the assertion of the respondent that he had worked as LDC for almost 15 years. In the circumstances, the inevitable inference is that the respondent was transferred to the Ayurvedic Hospital pursuant to a written order and in the said Ayurvedic Hospital he worked as an LDC from 1991 till 2006, and

hence did not perform the work of a Dresser. If that be so then the respondent becomes entitled for the emoluments as LDC and the petitioner is liable to pay the difference of emolument between LDC and the Dresser from 1991 up till 2006 and the difference in emolument cannot be denied to the respondent on any of the grounds raised by the petitioner.

30. The respondent had relied on *Judhistir Mohanty (supra)*, however, the said case is distinguishable as in that case the employer was transferred at his request but at the place of transfer the concerned post was of a revised pay scale than the original post of transferee. The order of transfer was silent in this regard as to the entitlement of the employee to a higher pay and in such circumstances it was held that the transferee would not be entitled to higher pay scale. In *Selvaraj vs Lt. Government of Island, Port Blair*, (1998) 4 SCC 291, the employee was not regularly promoted to the post of Secretary (scouts) but he was regularly asked to look after the duties of Secretary (scouts). Applying the principle of quantum meruit it was held by the Supreme Court that the authorities should have paid to the employee the emoluments available in the higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promotee. In *Sh.Bhagwan Dass and ors. Vs State of Haryana*

& ors., 1987 (3) SLJ 93 it was observed by the Supreme Court that whether the appointment was for temporary period or the scheme was temporary in nature is not relevant and what is to be seen is that once it is established that the nature of duties and functions discharged and the work done is similar, the doctrine of equal pay for equal work would be attracted. The employee in this case had been posted to officiate as Sub Post Master in HSG-I at the post office and he shouldered the higher responsibilities of the department and, therefore, he became entitled for emoluments of the post of HSG-I for those periods and he could not be denied those emoluments. In W.P(C) No.5742/2010, GNCT of Delhi v. B.S.Jarial and Anr. another Division Bench had held that when a person is told to discharge the functions and duties of a higher post till the same is filled up and he works for years together, as in this case the Deputy Superintendent was made to work as Superintendent for more than 7 years, it would be unjust to deny him wages for the said post. The Division Bench had held that if an employee is directed to work on a higher post he has no option but to work at higher post at the dictate of the employer, as for his not doing so would attract penalty proceedings against him.

31. In *Secy.-cum-Chief Engineer v. Hari Om Sharma*, (1998) 5 SCC 87 the employee was promoted on a stop-gap arrangement as a Junior Engineer I and he had given an undertaking that on the basis of the stop-gap arrangement, he would not claim any benefit pertaining to that post. It was held that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872. Applying the principle of quantum meruit the Supreme Court in the case of *Selvaraj* (Supra) had held that the employer has to pay to the respondents the emoluments available in the higher pay scale during the time they actually worked on the higher post.

32. Considering the entirety of the facts and circumstances, this Court does not find any illegality or un-sustainability in the order of the Tribunal or such perversity which shall entail any interference by

this Court in exercise of its jurisdiction under Article 226 of the Constitution of India against the order of the Tribunal dated 5th December, 2007. In the result, the writ petition is therefore, dismissed. The parties are, however, left to bear their own costs.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

MAY 04, 2011
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